HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

F.A.O No. 329 of 1999

Judgment reserved on:07.09.2006

Date of decision: 12th September, 2006

Smt. Vidya Devi and another ..Appellants

Versus

Tarlok Chand and another ..Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, J.

Whether approved for reporting: Yes/No

For the appellants:Mr.Bhupener Gupta, Sr.Advocate with Mr.Neeraj Gupta,Advocate

For the respondents: Mr.K.D.Sood, Advocate

Deepak Gupta, J.

The present appellants filed a suit against Tarlok Chand and Hem Raj for declaration that they are owners in possession of the suit property and in the alternative for possession thereof. The plaintiffs claimed that the suit land, as detailed in the plaint, was owned and possessed by their father, Dayal Singh alias Dayala, who expired on 17.4.1993. According to the plaintiffs they were the daughters and sole heirs of Dayal Singh and are owners in possession of their father's share. It was also alleged that the defendants in connivance with the

scribe and marginal witnesses had forged and prepared a fictitious will dated 2.4.1993 of their father. It was specifically alleged that Dayal Singh used to sign in English and there was no question of his thumb marking a will. It was also alleged that the thumb impression on the will was not of Dayal Singh. The learned trial court upheld the contentions of the plaintiffs and decreed the suit . It held that the will had not been properly proved and there were many suspicious circumstances surrounding the will.

An appeal was filed by the defendants in the court of learned District Judge, Kangra, who vide the impugned judgment has allowed the appeal and remanded the case back to the learned trial court. The lower appellate court has allowed an application under order 41 Rule 27 CPC moved by the defendants that the thumb impression on the will be compared with the thumb impressions available in the pension book of Dayal Singh and on his service book.

It would be pertinent to mention that the suit was filed on 12.5.1993 and issues in the case were framed on 2.9.1993. Thereafter the plaintiffs led evidence and examined PW-1, who stated that the deceased Dayal Singh used to sign in English and that on 3.4.1993 the

same date on which the alleged will was registered Dayal Singh had received his pension after signing in English. This witness has clearly stated that since no thumb impression of Dayal Singh has been attested on the Pension Payment Order (PPO) and his signatures in English have been attested, therefore, according to him the pension could have been released only if Dayal Singh had signed in English. In cross examination this witness admitted the suggestion put to him by the defendants that at the time of retirement, thumb impressions and fingers impressions are taken and these are kept in the record of Accountant General's Office. The statement of this witness was recorded on 5.5.1995. The evidence of all the witnesses of the plaintiffs was closed on 16.10.1995 and thereafter the case was listed for defendant's evidence. The evidence of the defendants was closed on 19.7.1996.

Thereafter the plaintiffs filed an application under Order 18 Rule 17-A CPC before the learned trial court praying that the original record (PPO) concerning Dayal Singh be summoned and sent alongwith the will to the expert for comparison of the thumb impression. This

application was rejected vide a detailed order passed by the learned trial court on 20.9.1996.

The original PPO had already been exhibited as Ex.PW-1/A. This does not bear the thumb impression of Dayal Singh. In the appeal filed by the defendants they filed another application under Order 41 Rule 27 read with Sections 45 and 73 of the Indian Evidence Act that the thumb impression on the will may be sent for comparison with the available thumb impression on the pension book of the deceased as well as his service book. On 27.11.1997 the learned appellate court passed the following order:-

> "Reply to the application under Sections 45 & 73 of Indian Evidence Act and order 41 Rule 27 C.P.C. filed. The service Book/record of deceased Dayal Singh, complete in all respect, be called for from A.G.Shimla. The service book be called on filing of full particulars and the address where the same is lying by the learned counsel for the appellants. It be now listed on 30.12.1997."

Thereafter a number of opportunities were taken and in fact notice was also issued to the defaulting officials when the record was not produced from the office of Accountant General. The learned District Judge on 18.8.1998 passed the following order:

> "As per the order of my learned predecessor dated 27.11.1997, it was ordered that the service book of deceased Dayal Singh be called from A.G. Shimla. However, despite having issued many letters from the court in this respect, no response is being received from A.G. Shimla and the letters are not being acknowledged.
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> It has been prayed that since the record is being summoned on the prayer of the appellant, therefore, it will be proper that the summons be issued to the dealing clerk to produce the record, through his superior officer, and then the same be sent for comparison as provided under Sections 45 and 73 of the Indian Evidence Act.
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> Though, there is no specific order regarding allowing the application under Sections 45 and 73 of the Evidence Act, but since the record had been ordered to be summoned, as such, it appears that by implication, the application stands allowed. I, therefore, allow the prayer of the applicant to summon the dealing clerk alongwith the record, so that it be sent to the expert for comparison. Necessary process fee etc. be deposited alongwith the full particulars of the dealing clerk, so that the summons could be issued for 23.9.1998."

On 21.11.1998 when the matter was taken up the record had been received. Thereafter vide the impugned judgment the matter was disposed of by remanding the case back to the learned trial court.

I have given my careful consideration to the case and in my opinion the judgment passed by the learned lower appellate court is totally unsustainable. The record produced by the Accountant General is the service book of the deceased. Neither the service book nor the PPO contains the thumb impression of Dayal Singh. The learned lower appellate court did not appreciate the fact that comparison of the thumb impressions could be made only with the admitted thumb impressions of Dayal Singh. Before allowing such an application it should have been proved which are the admitted thumb impressions of Dayal Singh. After the entire record has been produced, there are still no thumb impression of Dayal Singh on the record. Though almost 10 years have elapsed since the plaintiffs closed its evidence, till date the defendants have not been able to pin-point or place on record any material to show that the thumb impression of Dayal Singh exist at all. No doubt, PW-1 in his cross examination has admitted that at the time of retirement, the thumb impressions of the retiree are taken. However, it has not been shown as to whether the thumb impressions of Dayal Singh were taken or not. His thumb impressions are not there on the PPO or the service book. The entire record was

summoned by the lower appellate court from the office of Accountant General. But still no thumb impressions have seen the light of the day.

Keeping in view the aforesaid facts, I feel that the judgment passed by the learned lower appellate court is totally illegal and liable to be set aside. Therefore, the matter is remanded to the learned lower appellate court who shall restore the appeal to its original number and decide the same on the material on record. Keeping in view the fact that the original suit was filed as far back as in the year 1993, the lower appellate court is directed to decide the appeal as early as possible and in any event not later than 31st March, 2007.

The parties through their counsel are directed to appear before the learned lower appellate court on 10th October, 2006. The Registry is directed to ensure that the records of both the courts below are sent to the learned lower appellate court so as to reach well before the date fixed.

The appeal is disposed of in the aforesaid terms.

September 12, 2006(K) (Deepak Gupta), Judge